IN THE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

HOPE NATURAL GAS COMPANY, TEXAS GAS TRANSMISSION CORPORATION, and TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioners,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hope Natural Gas Company, Texas Gas Transmission Corporation and Texas Eastern Transmission Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on December 8, 1960.

A petition for a writ of certiorari to review this judgment has already been filed by Shell Oil Co. and

the other producer intervenors in the Court below, *Shell Oil Co. et al. v. Public Service Commission of the State of New York*, No. 774, this Term.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. in No. 774, App. B, pp. 28-33) is not yet reported. The order of the Federal Power Commission granting certificates (R. 87-110) is reported at 22 F.P.C. 378; its order denying rehearing (R. 123-125) is reported at 22 F.P.C. 657.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1960 (Pet. in No. 774, App. B, p. 34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The questions presented set out in the petition in No. 774 at pp. 2-4 are hereby incorporated herein by reference.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of June 21, 1938, as amended, 52 Stat. 821-833, as amended, are set out in the petition in No. 774, Appendix A, p. 27.

STATEMENT

The statement in the petition in No. 774 at pp. 4-10 is hereby incorporated by reference herein and made a part hereof. The following additional facts are also relevant:

Hope Natural Gas Company, the purchaser of the gas involved and one of the Petitioners herein, is a wholly-owned affiliate in the Consolidated Natural Gas System,[1] which is engaged in all phases of the natural gas business. Its facilities are integrated and its available gas supplies are centrally controlled and dispatched. In this integrated operation, Hope serves as the "hub" or "balance" company in satisfaction of the requirements of its sister companies, all of which, except Lake Shore, are among Hope's customers.

The System, at the end of 1958, distributed gas, at retail, to approximately 1,150,000 residential, commercial, and industrial customers in 793 cities and communities in Ohio, Pennsylvania and West Virginia. In addition, it supplied gas at wholesale to nonaffiliated gas companies serving 335 communities in New York, Pennsylvania and West Virginia. The cities and communities thus supplied have an estimated population exceeding 8,000,000. Many major industrial centers located in the Appalachian area are served by the System. (R. 37-38)

Under their arrangements with Hope, Petitioner Texas Gas Transmission Corporation gathers the gas here involved in south Louisiana and transports and delivers it to a point near Lebanon, Ohio, to Petitioner Texas Eastern Transmission Corporation, which, in turn, transports this gas and then redelivers it, for the account of Hope, at existing delivery points in Ohio, Pennsylvania and West Virginia presently utilized by

[1] Also included in the Consolidated System are The East Ohio Gas Company, New York State Natural Gas Corporation, The Peoples Natural Gas Company, The River Gas Company and Lake Shore Pipe Line Co.

Texas Eastern for its delivery and sale of natural gas to Hope and its affiliated customers. The facilities which Texas Gas was to and in fact did construct for the transportation service, were estimated to cost $39,600,000. The facilities to be utilized by Texas Eastern in connection with the transportation here involved represent an estimated capital investment of approximately $8,000,000 or a total capital investment, by both companies, of about $48,000,000.

REASONS FOR GRANTING THE WRIT

To avoid needless repetition, Petitioners incorporate herein by reference the reasons for granting the writ set out at pp. 10-25 of the petition in No. 774, which, Petitioners submit, amply demonstrate the need for review by this Court of the decision below. By way of emphasis, Petitioners wish to stress the following:

1. The Court below grossly misconstrued this Court's decision in *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U.S. 378 (*Catco*). The holding below that the "tenor" of *Catco* permits the Commission to issue unconditioned certificates to producers only when the initial price proposed is "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest" (Pet. in No. 774, App. B, p. 32), is diametrically opposed to this Court's ruling in *Catco* that "[the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates" (360 U.S. at 390-391). To the contrary, this Court pointed out, rates are not "the only factor bearing on the public convenience and necessity, for

§ 7(e) requires the Commission to evaluate all factors bearing on the public interest" (*id.* at 391).

However, this Court went on to comment that "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7" is required (*id.* at 391) and the fact that "prices have leaped from one plateau to the higher levels of another * * * make[s] price a consideration of prime importance," particularly during "this formative period when the ground rules of producer regulation are being evolved" (*ibid.* at 391). Consequently, "[w]here the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued" (*ibid.*). Such a situation, this Court continued, would be signaled when

> * * * the proposed price * * * is out of line or * * * its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored-nation" clauses or otherwise, * * * (*id.* at 392).

In such situations, the Commission may, in its discretion, deny the certificate or impose rate conditions if appropriate (*ibid.*).

From the above, it is clear that *Catco* merely admonished the Commission to "hold the line" against further unwarranted leaping of producer prices and left to the broad discretion of the Commission, as delegated to it by Congress, the responsibility of determining from the complex of factors bearing on the public interest, including the ever-increasing demands for gas by the consumers, the appropriate line at which to hold such prices.

As shown in the petition in No. 774, the prices proposed by the producers here are, unlike those in *Cateo*, not "out of line" and would not establish a new price plateau in the south Louisiana producing area involved. Moreover, these prices, again unlike those in *Cateo*, would neither trigger any price increases either to Hope or to any other gas purchasers, nor would they result in any increase in Hope's existing rates. Finally, in contrast to *Cateo*, the record here contains uncontroverted evidence that there was an urgent consumer need for these additional supplies of gas.

2. The issues presented are of broad general importance. The thrust of the holding below is to require the converting of producer certificate proceedings into rate hearings. The Commission, however, is already overburdened with an intolerable work load; as the Commission has recently pointed out, "[t]he number of completions of independent producer rate cases per man-year during the first 6 years following the *Phillips* decision [of this Court in 1954, 347 U.S. 672] indicate that nearly 13 years would be required for our present staff to dispose of the 2,313 cases pending on July 1, 1960." See *Re Phillips Petroleum Co.*, F.P.C. Opinion No. 338 (issued September 28, 1960), mimeo., p. 9. Since there have been literally thousands of certificate applications filed by producers each year (see Pet. in No. 774 at p. 12), the effect of the extensive additional hearings required by the ruling below would be to delay indefinitely the issuance of certificates to producers and the time when new gas can be made available to the consuming public.

The holding below would obstruct Commission issuance of certificates for the further reason that the Commission obviously cannot find in a producer certificate proceeding that a proposed rate is just and reasonable until the criteria for such a determination have been established. These criteria have not as yet been formulated. Indeed, it was in part because of its recognition that Commission regulation of producer rates was still in such "a formative stage" (360 U.S. at 391), that this Court in *Valco* expressly held the just and reasonable standard set out in Section 4(a) of the Act to be inapplicable to producer certificate applications under Section 7(e).

The clogging of the administrative machinery engendered by the decision below will clearly be contrary to the public interest. As suppliers of gas to ultimate consumers, retail as well as wholesale, Petitioners, along with other pipeline and distributing companies, constantly need to obtain additional gas supplies to meet the apparently insatiable demands of consumers for more and more gas. In the past, the pipelines have sought to meet these demands by appropriate expansions in their systems. Thus, the Commission authorized pipeline expansions having an aggregate estimated cost of $846,677,000 in the fiscal year ending 1960 and of $763,037,000 in the prior fiscal year (see Fortieth Annual Report of the Federal Power Commission (1960) at p. 63). If the decision below is permitted to stand, further pipeline expansions will be inordinately delayed and the needs of countless numbers of consumers for gas will go unsatisfied. Additionally, the delay in construction activities will have a substantial adverse impact upon the nation's economy.

CONCLUSION

For the foregoing reasons as well as those set out in the petition in No. 774, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 791

[redacted]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 793

HOPE NATURAL GAS COMPANY, TEXAS GAS TRANSMISSION CORPORATION AND TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

Petitioners hereby incorporate herein by reference the reply brief filed by the Petitioners in No. 774 which, we believe, shows that review by this Court of the decision below is warranted despite the brief in opposition filed by Respondent. By way of amplification, Petitioners herein wish to emphasize the following:

1. Respondent seeks to read into this Court's *per curiam* decision in *Transco-Seaboard* an affirmative rejection of the initial prices there involved (see, e.g., Br. in Opp., p. 13). Under well-established principles, however, it is clear that this Court made no substan-

tive rulings in its decision in *Transco-Seaboard* vacating the judgment of the Third Circuit and remanding the case "with directions to remand the case to the Federal Power Commission for reconsideration and redetermination in light of" *Catco*. All this Court held in *Transco-Seaboard* was that since its *Catco* opinion was rendered after the Commission's decision in *Transco-Seaboard* it was appropriate for the Commission to reconsider *Transco-Seaboard* in light of *Catco*. In other words, this Court wished to be assured that the Commission, the agency vested with primary responsibility for issuing certificates under Section 7(c), would reach the same result in *Transco-Seaboard* in light of *Catco*.

That such action by the Court does not involve any substantive rulings is apparent from the fact that in other cases where this Court has vacated a judgment of a lower court and remanded the case for reconsideration and redetermination "in light of" a particular recent decision, such action had not been construed by either this Court or the lower tribunal to which the case was remanded as involving any substantive ruling. See, e.g., *Barenblatt* v. *United States*, 354 U.S. 930 (1957); *Barenblatt* v. *United States*, 252 F. 2d 129 (App. D.C., 1958), affirmed, 360 U.S. 109 (1959); *Uphaus* v. *Wyman*, 355 U.S. 16 (1957); *Wyman* v. *Uphaus*, 101 N.H. 139, 136 A. 2d 221 (1958), affirmed, 360 U.S. 72 (1959); *Joines* v. *United States*, 357 U.S. 573 (1958); *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3, 1958), *cert. denied*, 358 U.S. 880 (1958).

2. Respondent asserts (in its Statement of Facts at pp. 4-5) that Hope's acquisition of gas in this case will increase the costs of gas to Hope's customers and, in support thereof, it undertakes to compare the costs

of this gas with the average cost to the Consolidated System of gas purchased by it assertedly "at the very same delivery points". These assertions are factually untrue and directly contradicted by evidence in the record, which Respondent could have disputed or cross-examined, but did not, at the time that the record was being made. Not only will this gas not be delivered at the same delivery points that Consolidated receives all of its pipeline purchased gas, as shown in the reply brief in No. 774, but the Commission expressly found on the record (R. 105) that the price paid for this gas will not result in any rate increase to Hope's customers (R. 54-55, 56).

Moreover, the predicate of Respondent's assertion, i.e., that Hope's costs of this acquisition and the System's pipeline purchased gas are comparable, is erroneous. On the one hand, the System's low average cost of pipeline purchased gas is achieved by utilizing Hope to absorb substantial fluctuations in the System's needs in the course of which Hope incurs substantial additional costs for storing, transporting and handling, which costs are reflected in the spread between the cost of pipeline purchased gas and Hope's resale rates. On the other hand, Hope will not incur additional costs of comparable magnitude in connection with the instant gas. Thus, the different additional costs incurred in connection with the instant gas and pipeline purchased gas make Respondent's attempted comparison thereof like comparing apples with oranges.

Contrary to Respondent's assertion (Br. in Opp., p. 5, fn. 4), Hope's recent *rate* filing was not predicated on its acquisition of the instant gas supply. In fact, as the filing shows on its face, the increased costs upon

which the filing was based were completely unrelated to this acquisition.[1]

CONCLUSION

For these reasons as well as those set out in our Petition and the Petition and Reply Brief in No. 774, it is respectfully submitted that a petition for writ of certiorari be issued in this case.

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[1] Respondent's gratuitous insinuation that the arrangements for handling this gas within the Consolidated System were improper, is totally unwarranted. Not only had no such question ever been raised previously but it is irrelevant to the problem now before this Court. Suffice it to say that it would have been completely impractical and more costly for each of the Consolidated companies to have purchased a portion of this gas in south Louisiana and entered into separate transportation arrangements to get this gas to their various markets.